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INTERPRETING THE NONDISCHARGEABILITY OF DRUNK DRIVING DEBTS UNDER SECTION 523(a)(9) OF THE BANKRUPTCY CODE: A CASE OF JUDICIAL LEGISLATION

VERYL VICTORIA MILES*

INTRODUCTION

In recent years, our society has been permeated by an impassioned and vociferous movement against drunk driving. This movement has been so effective and influential that it has provoked numerous and varied statutory responses from legislative bodies throughout the country.¹ One of the most provocative responses is codified in section 523(a)(9) of the Federal Bankruptcy Code (the Code).² This provision was added to the Code as a part of the consumer amendments of the Bankruptcy Amendments and Federal Judgeship Act of 1984.³ Section 523(a)(9) attempts to prevent an individual who has filed a petition in bankruptcy from escaping financial liability for debts that he or she may have incurred as a result of having operated a motor vehicle while legally intoxicated.⁴

The individual debtor who has filed a bankruptcy petition

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1. For articles addressing the nationwide legislative responsiveness to the anti-drunk driving movement, see Bruce & Bruce, *The Legislative Response To The Drunk Driving Dilemma: An Empirical Analysis of Its Success and Failure*, 33 ST. LOUIS U.L.J. 177 (1988); Joye, Jr., *Drunk Driving: Recommendations For Safer Highways*, TRIAL, June 1983, at 60; Note, *The National Minimum Drinking Age Act of 1984: Once Again Congress Mails Home Another Fist*, 34 CLEV. ST. L. REV. 637 (1985-86); Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643 (1988); Comment, *DWI Laws: Getting Tough on Drunks*, 28 S.D.L. REV. 491 (1983).

2. 11 U.S.C. § 523(a)(9) (1988).

3. Pub. L. No. 98-353, 98 Stat. 353 (1984).

4. Section 523(a) provides:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . . .
(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred[.]

11 U.S.C. § 523(a)(1988).

under Chapter 7 of the Code⁵ is the focus of the goals of section 523(a)(9). The bankrupt debtor's objective in seeking relief through a Chapter 7 liquidation is to settle his or her outstanding debts by distributing the proceeds from the debtor's nonexempt assets to prepetition creditors, and to be discharged from any further liability to such creditors.⁶ This provision of financial relief under the Code provides the deserving debtor with a clean slate and "fresh start" and is one of the longstanding and basic tenets of bankruptcy law.⁷ An equally important goal of the Code, however, is to assure fair and equitable treatment of the debtor's creditors: to see that assets of the debtor are distributed equitably and that the debtor seeking financial forgiveness is worthy of such relief.⁸ Accordingly, if the debtor in bankruptcy has engaged in conduct that is unworthy of discharge or forgiveness, discharge will be denied under the Code and the debtor will remain financially liable for the debt to the prepetition creditor.

Section 523 (a)(9) is one of ten exceptions to the debtor's discharge from certain types of debts that are protected under the Code.⁹ As noted above, the debtor who has filed a Chapter 7 peti-

5. *Id.* §§ 701-766 (Chapter 7 liquidation provisions).

6. See B. WEINTRAUB & A. RESNICK, *BANKRUPTCY LAW MANUAL* ¶ 1.02[1][a] (rev. ed. 1986).

7. See *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

When considering Senate Bill 2266, a precursor of the Bankruptcy Reform Act of 1978, the Senate Judiciary Committee characterized the bill as an update of the then existing Bankruptcy Act of 1898, and further noted that the "substantive law of bankruptcy and current bankruptcy system were designed in 1898." S. REP. NO. 989, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5788. In *Stellwagen*, the Supreme Court offered the following description of the basic principles of our federal bankruptcy system under the Bankruptcy Act, the essence of which continues under the Code:

The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.

Stellwagen, 245 U.S. at 617.

8. See *supra* note 7.

9. The effect of § 523(a) is to except specific debts of the bankrupt from discharge. However, under § 727(a) of the Code, 11 U.S.C. § 727(a) (1988), the debtor may be denied a discharge from all of his or her debts. The grounds for a complete denial of discharge under § 727(a) generally are predicated on the debtor's misconduct in the bankruptcy case. Under this provision, the debtor may be denied a discharge of all of his or her debts if he or she has: "transferred, removed, destroyed, mutilated, or con-

tion in bankruptcy does so with the expectation of being discharged from his or her prepetition debts. The Code, however, does not permit such a discharge if the debt was incurred by the debtor unscrupulously, or if there is some compelling public interest mandating that the debtor's personal liability for the debt should survive bankruptcy.¹⁰ Examples of these types of debts are: tax obligations;¹¹ outstanding loans incurred by the debtor fraudulently, through the use of materially false information;¹² debts that the debtor knowingly has failed to identify as outstanding in his or her bankruptcy petition;¹³ outstanding alimony or child support obligations;¹⁴ debts resulting from the debtor's "willful and malicious injury" of another entity or its property;¹⁵ or outstanding educational loans that were funded by governmental units or non-profit organizations.¹⁶

The addition of subsection (a)(9) to section 523 similarly reflects Congress' intention to protect the public interest by providing victims of drunk drivers with some assurance of financial reparation for injuries sustained as a result of the driver's action. It also serves as a sanction against a debtor's wrongful conduct in having driven a motor vehicle while intoxicated. In both respects, section 523(a)(9)

cealed" property within a year prior to the bankruptcy with the "intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title," *id.* § 727(a)(2); "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained," *id.* § 727(a)(3); knowingly and fraudulently made a false oath, false account, false claim, or given or received a bribe or withheld records, *id.* § 727(a)(4); or failed to "explain satisfactorily" a loss of assets. *Id.* § 727(a)(5).

10. One commentator states:

The policy of relief to beleaguered debtors is a highly important one in bankruptcy This policy is not so important, however, as to negate other important policies which the law feels a responsibility to foster and abet. In general, the two bases of policy upon which exceptions of Section 523 of the Code appear to be founded are: (1) that the debtor should not be relieved of his financial responsibility to those who have a high moral claim upon him due to their dependence upon him or their weak bargaining position in relation to him or perhaps both; and (2) that the relief of discharge is intended for the honest and thus certain debts created by the debtor's unlawful or oppressive conduct should remain his obligations.

1 D. COWAN, BANKRUPTCY LAW AND PRACTICE § 6.2, at 691-92 (rev. ed. 1989).

11. 11 U.S.C. § 523(a)(1) (1988).

12. *Id.* § 523(a)(2).

13. *Id.* § 523(a)(3).

14. *Id.* § 523(a)(5).

15. *Id.* § 523(a)(6).

16. *Id.* § 523(a)(8).

demonstrates legislative responsiveness to a national movement against drunk driving.

Although section 523(a)(9) is a laudable example of positive and innovative anti-drunk driving legislation, it exhibits a certain weakness in draftsmanship. This weakness has resulted in a potential loophole through which debtors have attempted to avoid financial responsibility for drunk driving liability, and has created "legitimate debate" for the courts in interpreting and applying the provision.¹⁷ As section 523(a)(9) is written, a debtor will not be entitled to discharge from such debt if (1) it "arises from a judgment or consent decree entered in a court of record" and if (2) it "was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated."¹⁸ Accordingly, for a debt to meet the requirements for nondischargeability under subsection (a)(9), it must arise from a "judgment or consent decree entered in a court of record" and there must be proof that the debtor was "legally intoxicated" while operating the motor vehicle for which the debt was incurred.¹⁹

It is in the first of these requirements, that the debt arise from a "judgment or consent decree," that some debtors have attempted to create a loophole to avoid the nondischargeability of debts arising from liability for drunk driving. To this end, debtors have filed their petitions in bankruptcy before drunk driving victims (creditors)²⁰ have been able to obtain a judgment or consent decree against them.²¹ The debtors in these cases have argued that a credi-

17. See *Young v. Rose (In re Rose)*, 86 Bankr. 86, 88-89 (Bankr. E.D. Mich. 1988) (noting different judicial interpretations of § 523(a)(9)).

18. 11 U.S.C. § 523(a)(9) (1988).

19. *Id.*

20. The term "creditor" is defined under the Code to include any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id.* § 101(9). This would include any individual seeking damages against a debtor for any injuries or losses sustained as a result of the debtor's drunk driving.

21. See *Stackhouse v. Hudson (In re Hudson)*, 859 F.2d 1418, 1419 (9th Cir. 1988) [hereinafter *Hudson II*] (debtor filed bankruptcy petition one day before trial in which debtor was sued for injuries from debtor's drunken driving); *Burch v. Tyler (In re Tyler)*, 98 Bankr. 396, 399 (Bankr. N.D. Ill. 1989) (debtor filed for bankruptcy before his drunk driving victim could obtain a judgment in state court); *Bryant v. Straup (In re Straup)*, 90 Bankr. 481, 482 (D. Utah 1988) (debtor filed his bankruptcy petition after his default had been entered in a civil action by a victim of his drunk driving, but prior to the entry of a default judgment against him); *Rose*, 86 Bankr. at 87 (before debtor filed a bankruptcy petition, debtor's drunk driving victim filed a state court action against debtor); *Allstate Ins. Co. v. Smith (In re Smith)*, 83 Bankr. 433, 434 (Bankr. E.D. Mich. 1988) (debtor filed bankruptcy petition after debtor's insurance company filed a subrogation claim against him for money it paid out on his behalf for injuries caused by his drunken

tor who petitions the court for relief, without a judgment or consent decree from a court of record, is ineligible for relief under section 523(a)(9).²² A majority of the bankruptcy courts considering these cases have rejected this argument and have permitted creditors to seek relief under section 523(a)(9) without a prepetition judgment or consent decree against the debtor.²³ These courts have looked to selected congressional testimony regarding section 523(a)(9) to deemphasize the significance of the "plain language" of the provision and have deemed section 523(a)(9) to be an unfortunate example of "inartful draftsmanship."²⁴

While the courts have taken this view to prevent the fast and clever debtor from avoiding the financial liability that section 523(a)(9) is designed to preserve, one cannot help but question whether these courts have ventured out of the realm of judicial interpretation and into that of judicial legislation. Discomfort with the court's position is not unwarranted in a time in which judicial restraint in statutory construction is a common course of conduct advocated by our higher courts.²⁵

driving); *Jones v. Hager (In re Jones)*, 80 Bankr. 974, 975 (W.D. Mo. 1987) (drunk driving victim filed state court action against debtor before debtor filed a petition for bankruptcy); *American Family Mut. Ins. Co. v. Anderson (In re Anderson)*, 74 Bankr. 463, 464 (Bankr. E.D. Wis. 1987) (debtor filed a bankruptcy petition after debtor's insurance company filed a subrogation claim for money it paid out on his behalf for injuries caused by his drunk driving); *Leach v. Reckley (In re Leach)*, 63 Bankr. 724, 725 (S.D. Ind. 1986) (debtor filed for bankruptcy before his drunk driving victim could obtain a judgment against him in state court); *Thomas v. Ganzer (In re Ganzer)*, 54 Bankr. 75, 76 (Bankr. D. Minn. 1985) (drunk driving victim sued debtor in state court, but prior to judgment debtor filed for bankruptcy); *Searight v. Thomas (In re Thomas)*, 51 Bankr. 187, 189 (Bankr. E.D. Va. 1985) (debtor filed for bankruptcy three weeks prior to state court trial); *Avitto v. Cardona (In re Cardona)*, 50 Bankr. 596, 597 (Bankr. S.D. Fla. 1985) (victim of debtor's drunk driving had a pending tort action in state court when debtor filed bankruptcy petition).

22. See *Hudson II*, 859 F.2d at 1419; *Tyler*, 98 Bankr. at 398; *Straup*, 90 Bankr. at 482; *Rose*, 86 Bankr. at 87; *Smith*, 83 Bankr. at 434; *Jones*, 80 Bankr. at 975; *Anderson*, 74 Bankr. at 464; *Leach*, 63 Bankr. at 726; *Ganzer*, 54 Bankr. at 76; *Thomas*, 51 Bankr. at 188.

23. See *Hudson II*, 859 F.2d at 1424; *Tyler*, 98 Bankr. at 398; *Straup*, 90 Bankr. at 484; *Rose*, 86 Bankr. at 91; *Smith*, 83 Bankr. at 436; *Jones*, 80 Bankr. at 976; *Anderson*, 74 Bankr. at 464; *Leach*, 63 Bankr. at 727; *Ganzer*, 54 Bankr. at 77; *Thomas*, 51 Bankr. at 189; *Cardona*, 50 Bankr. at 597. But see *Stackhouse v. Hudson (In re Hudson)*, 73 Bankr. 649 (Bankr. 9th Cir. 1987) [hereinafter *Hudson I*] (requiring creditors to obtain prepetition judgment for damages against debtor as prerequisite to having debts declared nondischargeable), *rev'd*, 859 F.2d 1418 (9th Cir. 1988).

24. See cases cited *supra* note 22.

25. The dissenting opinion in *Hudson II* cites Justice Marshall on the appropriate exercise of statutory construction in *United States v. Locke*, 471 U.S. 84 (1985). 859 F.2d at 1427 (Wiggins, J., dissenting). In his opinion, Justice Marshall stated that courts do not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do," and that it is not a court's responsibility to "soften the

Only one federal circuit court has considered the question whether a creditor without a prepetition judgment or consent decree is eligible for relief under section 523(a)(9). In *Stackhouse v. Hudson* (In re *Hudson*) (*Hudson II*),²⁶ a Ninth Circuit Court majority elected to follow the lower bankruptcy courts in de-emphasizing the plain language of the provision to prevent "quick-thinking debtors" from escaping financial liability for drunk driving.²⁷ The compelling and persuasive dissenting opinion in *Hudson II* criticized the majority's judicial legislating, charging that it interpreted section 523(a)(9) in a manner that was contrary to the wording of the provision, and thus, violated principles of statutory construction.²⁸ The dissent also provoked a valid challenge to the majority's interpretation of congressional intent in enacting section 523(a)(9), and maintained that a prepetition judgment or consent decree against the debtor was necessary for relief under the provision.²⁹

This article presents a critical analysis of section 523(a)(9) and explores the appropriate limits of statutory construction in the judicial interpretations of the provision. Part I of the article includes a discussion of the history of section 523(a)(9) and why it was necessary for Congress to enact a special anti-drunk driving provision to assure that bankrupts could not escape financial liability for drunk driving debts under the Code. This section also will address how the addition of section 523(a)(9) has expanded and affected the options for nondischargeability determinations under the Code. Part II focuses on the (1) "inartfully drafted" language of section 523(a)(9), (2) the loophole that debtors have attempted to forge to escape liability thereunder, and (3) the case law interpreting section 523(a)(9) in response to this loophole. This article will show that it is an inappropriate exercise of statutory construction for courts to interpret section 523(a)(9) on the basis of "presumed" congres-

clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Locke*, 471 U.S. at 95 (citations omitted). He noted that "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *Id.* (citations omitted).

Several federal circuit courts have followed *Locke* in applying these principles in interpreting congressional legislation. See *United States v. Lund*, 853 F.2d 242, 247 (4th Cir. 1988); *United States v. Mollica*, 849 F.2d 723 (2nd Cir. 1988); *Miller v. Comm'r*, 836 F.2d 1274, 1285 (10th Cir. 1988); *Amalgamated Transit Union v. Brock*, 809 F.2d 909, 915 (D.C. Cir. 1987).

26. 859 F.2d 1418 (9th Cir. 1988).

27. *Id.* at 1420.

28. *Id.* at 1424-28 (Wiggins, J., dissenting).

29. *Id.* at 1426.

sional intent, as opposed to the literal language of the provision in an effort to overcome the weakness of the "inartfully drafted" language of section 523(a)(9).³⁰

I. THE LEGISLATIVE EVOLUTION OF SECTION 523(a)(9)

Section 523(a)(9) was added to the Code to fill a void in the debt discharge exceptions that existed before its enactment under the Bankruptcy Amendments and Federal Judgeship Act of 1984. Prior to 1984, a creditor could seek only a nondischargeability determination against a debtor for a drunk driving debt under section 523(a)(6) of the Code.³¹ Under section 523(a)(6), a debtor is not discharged of a debt resulting from the debtor's "willful and malicious injury . . . to another entity or to the property of another entity."³²

The creditor's burden of proving that the debtor engaged in "willful and malicious" conduct by driving a motor vehicle while drunk or legally intoxicated is difficult in most cases;³³ the courts have split as to whether drunk driving constitutes "willful and malicious" conduct under section 523(a)(6).³⁴ Application by the courts of different legal standards to determine whether a debtor's conduct was willful and malicious is the basis for the split among the

30. *Id.* at 1424.

31. 11 U.S.C. § 523(a)(6) (1988).

32. *Id.*

33. The legislative history of § 523(a)(9) revealed:

Under present law [section 523(a)(6)], a debt that is the result of a tortious act—such as a judgment against a debtor as the result of an automobile accident—is non-dischargeable only if the debt is the result of a "willful and malicious injury" to the property or person of another.

In most states, an injury resulting from an act of drunk driving will support a finding only of negligence on the part of the driver. Thus, more often than not, the debt is discharged—unless the bankruptcy court finds that the act of drunk driving was a willful and malicious act by the nature of the circumstances surrounding it.

S. REP. NO. 65, 98th Cong., 1st Sess. 43 (1983).

34. Some cases held that a debtor's intention to drive a motor vehicle while legally intoxicated constituted willful and malicious conduct under § 523(a)(6). See *Caldarelli v. Callaway* (*In re Callaway*), 41 Bankr. 341, 346 (Bankr. E.D. Pa. 1984); *Burns v. Cloutier* (*In re Cloutier*), 33 Bankr. 18, 20 (Bankr. D. Me. 1983); *Brawner v. Askew* (*In re Askew*), 22 Bankr. 641, 643 (Bankr. M.D. Ga. 1982), *aff'd without opinion*, 705 F.2d 469 (11th Cir. 1983); *Long v. Greenwell* (*In re Greenwell*), 21 Bankr. 419, 421 (S.D. Ohio 1982). Cases taking a contrary position required proof of intent to injure another in order to satisfy the willful and malicious intent requirement of subsection (a)(6). See *In re Maney*, 23 Bankr. 61, 62 (Bankr. W.D. Okla. 1982); *Castiglia v. Morgan* (*In re Morgan*), 22 Bankr. 38, 39 (Bankr. D. Neb. 1982); *Heritage Mut. Ins. Co. v. Naser* (*In re Naser*), 7 Bankr. 116, 118 (Bankr. W.D. Wis. 1980); *Williams v. Bryson* (*In re Bryson*), 3 Bankr. 593, 596 (Bankr. N.D. Ill. 1980).

courts.³⁵ One view is that the creditor must provide evidence sufficient to show that the debtor intended to injure someone.³⁶ Under this standard, evidence that a debtor has driven a motor vehicle while drunk or legally intoxicated, without more, is not sufficient evidence that the debtor intended to injure anyone.³⁷ The other view is that intent to specifically injure someone is not necessary; the creditor need only prove that the debtor intended to engage in a wrongful act.³⁸ Under the latter view, evidence that a debtor caused injury to the creditor as a result of voluntarily drinking and operating a motor vehicle while under the influence of alcohol is sufficient to show the required intent under section 523(a)(6).³⁹

Section 523(a)(9) was enacted to resolve the uncertainty surrounding the nondischargeability of drunk driving debts under the Code. Congressman Rodino, the Chairman of the House Committee on the Judiciary, stated that "[section 523(a)(9)] clarifie[d] present law relating to the nondischargeability of debts incurred by drunk drivers," and that "[d]ebts incurred by persons driving while intoxicated are presumed to be willfully and maliciously incurred under this provision."⁴⁰

Unfortunately, the addition of subsection (a)(9) to section 523 has not resolved all of the interpretive difficulties courts face in determining the nondischargeability of drunk driving debts under subsection (a)(6). These interpretive difficulties have resulted in a split between federal circuit courts over whether subsection (a)(9) "clarifie[s]" the treatment of drunk driving debts at bankruptcy so

35. The legislative history of § 523(a)(6) provided that the "willful and malicious" standard that is required under the provision involves conduct by the debtor that is "deliberate or intentional," and something more than a "reckless disregard" standard. S. REP. NO. 989, 95th Cong., 2d Sess. 79, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865; H.R. REP. NO. 595, 95th Cong., 1st Sess. 365, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320-21.

36. See *Maney*, 23 Bankr. at 62; *Morgan*, 22 Bankr. at 39; *Naser*, 7 Bankr. at 118; *Bryson*, 3 Bankr. at 596.

37. One court, interpreting the standard, stated: "Here the defendant showed reckless disregard. He was drunk when he ran into the plaintiff. But there is no evidence that the defendant intended to injure anyone. His conduct cannot be described as 'willful and malicious' under § 523(a)(6)." *Bryson*, 3 Bankr. at 596.

38. See *Callaway*, 41 Bankr. at 346 (driving in intoxicated state sufficiently intentional and deliberate); *Cloutier*, 33 Bankr. at 20 (debtor cannot claim that he did not intend to cause some injury); *Prosch v. Wooten* (*In re Wooten*), 30 Bankr. 357, 358 (Bankr. N.D. Ala. 1983) (personal ill will towards the injured party is not a requirement); *Askeu*, 22 Bankr. at 642 (whether person does something intentionally can only be determined by his conduct); *Greenwell*, 21 Bankr. at 421 (not necessary that personal ill will exist).

39. See, e.g., *Callaway*, 41 Bankr. at 346 (voluntary act of drinking and driving sufficiently intentional).

40. 130 CONG. REC. H7489 (daily ed. June 29, 1984) (emphasis added).

that such conduct constitutes "willful and malicious injury" under subsection (a)(6).⁴¹ This point of contention is relevant to any dis-

41. The Court of Appeals for the Ninth Circuit was the first circuit court to interpret the impact that the newly enacted subsection (a)(9) would have on nondischargeability determinations of drunk drivers' debts under subsection (a)(6). In *Moraes v. Adams (In re Adams)*, 761 F.2d 1422 (9th Cir. 1985), the court held that subsection (a)(9) clarified the law regarding the nondischargeability of drunk drivers' debts under the Code. *Id.* at 1427. Thus, driving while intoxicated would satisfy the "willful and malicious" standard under subsection (a)(6):

Whether driving while intoxicated—with or without knowledge of the probable consequences—constitutes conduct that is "willful" and "malicious" would present a close question if we were limited in our interpretation of section 523(a)(6) to the language of that subsection and the legislative history in existence at the time the matter was decided in the district court. However, two months after judgment was entered Congress answered the question in the form of an amendment to Title 11. In July of 1984, Congress enacted 11 U.S.C. § 523(a)(9) which, in our view, prescribes the manner in which we must construe section 523(a)(6). Section 523(a)(9) provides explicitly that debts arising from liabilities incurred as a result of drunk driving are nondischargeable. The legislative history underlying the 1984 amendment makes it clear that by enacting the amendment, Congress intended to clarify pre-existing law

.....
In addition to the expression of Congressional intent underlying section 523(a)(9), we are influenced by the fact that at the time that amendment was enacted there was a clear conflict among the *nisi prius* courts, in this case the bankruptcy courts, over the meaning of section 523(a)(6). With respect to statutory construction, we view conflict among courts as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. Accordingly, we construe section 523(a)(6) in light of the clarification of congressional intent provided by section 523(a)(9).

... [W]e hold that the voluntary acts of drinking and driving while intoxicated constitute conduct sufficiently intentional to support a finding of willfulness and malice, as contemplated by section 523(a)(6) and that this interpretation must be given retroactive application.

Id. at 1426-27 (footnote and citations omitted).

In *State Farm Mut. Auto. Ins. Co. v. Fielder (In re Fielder)*, 799 F.2d 656 (11th Cir. 1986), the Court of Appeals for the Eleventh Circuit agreed with this interpretation of subsection (a)(9) and its impact on subsection (a)(6), having "look[ed] to § 523(a)(9) just as the Ninth Circuit did in *In re Adams*, as a clarification of and not as an 180 degree turn from the law as it existed prior to the enactment of § 523(a)(9)." *Id.* at 661.

Two other circuit courts, however, have disagreed with the interpretation of the *Adams* court. The Court of Appeals for the Tenth Circuit, in *Farmers Ins. Group v. Compos (In re Compos)*, 768 F.2d 1155 (10th Cir. 1985), interpreted the willful and malicious requirement of subsection (a)(6) as requiring "proof of an intent to injure before a debt can be held to be nondischargeable," and held that subsection (a)(6) "does not except from discharge intentional acts which cause injury." *Id.* at 1158-59. Accordingly, evidence of driving while intoxicated, without proving any intent to injure by the debtor, was insufficient to meet the willful and malicious standard. *Id.* at 1159. In *Cassidy v. Minihan*, 794 F.2d 340 (8th Cir. 1986), the Court of Appeals for the Eighth Circuit followed the Eleventh Circuit in similarly rejecting the holding of *Adams*:

We are aware of the Ninth Circuit's contrary view expressed in *In re Adams*.

That court concluded that the subsequent amendment to the Code, especially in light of the existing division among the authorities, should be viewed as an

cussion of the nondischargeability of drunk driving debts under the Code, as cases involving requests for such determinations under section 523(a)(6) have continued to surface even after section 523(a)(9) became effective. Although section 523(a)(9) is the primary provision under which nondischargeability requests and determinations are made, relief under subsection (a)(6) may be sought concurrently with subsection (a)(9) when the creditor is uncertain as to whether the circumstances supporting his or her request for relief meet all of the requirements of subsection (a)(9).⁴²

II. JUDICIAL INTERPRETATIONS OF SECTION 523(a)(9)

A. *Limiting the Loophole*

While section 523(a)(6) continues to be an option for creditors with claims against bankrupts for drunk driving debts, the majority of the cases involving the nondischargeability of such debts are decided under section 523(a)(9).⁴³ For a debt to be nondischargeable

attempt to clarify the intent of the 1978 Congress. We decline, however, to follow that approach, which essentially renders section (a)(9) retroactively applicable. Section 523(a)(9) added a new exception to discharge, it did not amend the provision which is here in dispute. While a broader reading of section 523(a)(6) may to some yield a salutary outcome in cases dealing with drunk-driving, we must defer to the intent of the Congress drafting section 523(a)(6) and accord it a narrow interpretation.

Id. at 344 n.7.

42. In *Milam v. Vorek* (*In re Vorek*), 95 Bankr. 599, 604 (Bankr. S.D. Ind. 1989), *State Farm Mut. Auto. Ins. Co. v. Wright* (*In re Wright*), 66 Bankr. 403, 407 (Bankr. S.D. Ind. 1986), and *Hale v. Frazee* (*In re Frazee*), 60 Bankr. 109, 111 (Bankr. W.D. Mo. 1986), the creditor was unable to provide evidence that the debtor was legally intoxicated while operating the motor vehicle as required under § 523(a)(9). Because the creditor in these cases sought relief under both subsections (a)(9) and (a)(6) of § 523, the court in each case was able to consider the question of nondischargeability under both provisions. See *Vorek*, 95 Bankr. at 604-05; *Wright*, 66 Bankr. at 406-07; *Frazee*, 60 Bankr. at 110.

The court in *City of Akron v. Jackson* (*In re Jackson*), 77 Bankr. 120 (Bankr. N.D. Ohio 1987), noted that even though a drunk driving debt may not satisfy the requirements for nondischargeability under subsection (a)(9), the debt may be nondischargeable under subsection (a)(6). *Id.* at 123. Similarly, the court in *Bippus v. Moore* (*In re Moore*), 53 Bankr. 259 (Bankr. S.D. Ohio 1985), stated that "[t]he enactment of § 523(a)(9) does not preclude a claimant from proceeding under § 523(a)(6) for relief in a drunk driving situation." *Id.* at 261.

43. See *Hudson II*, 859 F.2d 1418, 1419 (9th Cir. 1988); *Burch v. Tyler* (*In re Tyler*), 98 Bankr. 396, 396 (Bankr. N.D. Ill. 1989); *Vorek*, 95 Bankr. at 600; *Bryant v. Straup* (*In re Straup*), 90 Bankr. 481, 482 (D. Utah 1988); *Young v. Rose* (*In re Rose*), 86 Bankr. 86, 87 (Bankr. E.D. Mich. 1988); *Allstate Ins. Co. v. Smith* (*In re Smith*), 83 Bankr. 433, 434 (Bankr. E.D. Mich. 1988); *Harrison v. Brunson* (*In re Brunson*), 82 Bankr. 634, 635 (Bankr. S.D. Ga. 1988); *Government Employers Ins. Co. v. Bennett* (*In re Bennett*), 80 Bankr. 800, 800 (Bankr. E.D. Va. 1988); *Williams v. Hart* (*In re Hart*), 83 Bankr. 840, 841 (Bankr. M.D. Ga. 1987); *General Casualty Co. v. Keating* (*In re Keating*), 80 Bankr. 115,

under section 523(a)(9), two requirements must be present in the creditor's petition for relief: (1) The creditor must have obtained a judgment or consent decree, issued by a court of record, against the debtor for a debt resulting from the debtor's operation of a motor vehicle, and (2) the creditor must establish that the motor vehicle was operated by the debtor while he or she was "legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred."⁴⁴ To satisfy the second requirement of section 523(a)(9), the creditor generally will only need to prove that at the time of the accident, the debtor was "legally intoxicated" as defined by the laws of the state in which the accident occurred.⁴⁵

116 (Bankr. E.D. Wis. 1987); *Commercial Union Ins. Co. v. Christiansen* (*In re Christiansen*), 80 Bankr. 481, 481 (W.D. Mo. 1987); *Jones v. Hager* (*In re Jones*), 80 Bankr. 974, 974 (W.D. Mo. 1987); *Sickel v. Pahule* (*In re Pahule*), 78 Bankr. 210, 210 (E.D. Wis. 1987), *aff'd*, 849 F.2d 1056 (7th Cir. 1988); *Jackson*, 77 Bankr. at 124; *American Mut. Ins. Co. v. Anderson* (*In re Anderson*), 74 Bankr. 463, 463 (Bankr. E.D. Wis. 1987); *Hoover v. Gomez* (*In re Gomez*), 70 Bankr. 96, 97 (Bankr. S.D. Fla. 1987); *Gray v. Lewis* (*In re Lewis*), 69 Bankr. 600, 600 (Bankr. S.D. Fla. 1987); *Wright*, 66 Bankr. at 407; *Leach v. Reckley* (*In re Leach*), 63 Bankr. 724, 725 (S.D. Ind. 1986); *Frazee*, 60 Bankr. at 110; *Thomas v. Ganzer* (*In re Ganzer*), 54 Bankr. 75, 76 (Bankr. D. Minn. 1985); *Moore*, 53 Bankr. at 260; *Searight v. Thomas* (*In re Thomas*), 51 Bankr. 187, 188 (Bankr. E.D. Va. 1985); *Dougherty v. Brackett* (*In re Dougherty*), 51 Bankr. 987, 988 (Bankr. D. Colo. 1985); *Avitto v. Cardona* (*In re Cardona*), 50 Bankr. 596, 598 (Bankr. S.D. Fla. 1985); *Brunswick v. Cunningham* (*In re Cunningham*), 48 Bankr. 641, 642 (Bankr. W.D. Tenn. 1985).

44. 11 U.S.C. § 523(a)(9)(1988).

45. *See Vorek*, 95 Bankr. at 604-05; *Brunson*, 82 Bankr. at 636; *Keating*, 80 Bankr. at 118-19; *Jones*, 80 Bankr. at 978; *Hart*, 83 Bankr. at 842; *Gomez*, 70 Bankr. at 98; *Lewis*, 69 Bankr. at 601; *Dougherty*, 51 Bankr. at 989.

A few courts, however, have required that the creditor not only prove that the debtor was legally intoxicated at the time of the accident, but that the debtor's legal intoxication was the cause of the accident. *See Ross v. Carney* (*In re Carney*), 68 Bankr. 655, 658 (Bankr. D.N.H. 1986); *Christiansen*, 80 Bankr. at 482-83; *Wright*, 66 Bankr. at 407. These cases appear to be in the minority in this interpretation.

Courts taking the majority view have interpreted the language of subsection (a)(9) differently. In *Keating*, the court stated that "[t]he phrase 'while legally intoxicated' modifies the word 'operation', denoting only a condition in existence at the time of operation. If the condition exists at that moment, inquiry need go no further." *Keating*, 80 Bankr. at 118. The court in *Keating* noted that while subsection (a)(9) was intended to prevent drunk drivers from escaping financial liability for their actions under the Code, it was also designed to "create an objective standard to determine nondischargeability in drunk driving cases." *Id.* The court also argued that if the provision required proof that the debtor's intoxication caused the accident, bankruptcy courts would have to make the same kind of "case by case fact determinations" in drunk driving cases that had been necessary under the "willful and malicious" standard of subsection (a)(6), which Congress no longer intended with the enactment of subsection (a)(9). *Id.*; *see also Jones*, 80 Bankr. at 977-78 (bankruptcy court need only resolve intoxication issue to extent of

The first requirement of section 523(a)(9) presents the courts with an intriguing interpretive challenge. In numerous bankruptcy cases, the debtor facing potential financial liability for drunk driving has filed a petition in bankruptcy before the creditor has been able to obtain a judgment or consent decree against the debtor from a court of record.⁴⁶ These cases have confronted the courts with the task of determining whether the absence of a judgment or consent decree at the time that the petition is filed renders the creditor ineligible for relief under section 523(a)(9).⁴⁷

Although the courts have permitted creditors without prepetition judgments or consent decrees to seek relief under subsection (a)(9), they have had to justify this allowance on selective readings of congressional intent as opposed to the language of the provision.⁴⁸ One of the first cases to confront this situation was *Searight v. Thomas* (In re *Thomas*).⁴⁹ In its interpretation of the "judgment and consent decree" requirement of section 523(a)(9), the court stated that Congress is not always the "artful drafter of legislation," and that "[f]rom a plain reading [of the provision], it would indeed appear that the claim against an intoxicated driver must be reduced to judgment or consent prior to the offender's bankruptcy."⁵⁰ The court, however, refused to interpret section 523(a)(9) as requiring a prepetition judgment or consent decree, because it would give "quickthinking drunks or their attorneys" a means of escaping liability by racing to file a bankruptcy petition before an injured party could obtain a judgment against the debtor.⁵¹ The court held that

whether debtor was legally intoxicated); *Gomez*, 70 Bankr. at 98 (court did not require causation as necessary element to establish nondischargeability).

46. See, e.g., *Hudson II*, 859 F.2d at 1419; *Tyler*, 98 Bankr. at 397; *Straup*, 90 Bankr. at 482; *Rose*, 86 Bankr. at 87; *Smith*, 83 Bankr. at 434; *Jones*, 80 Bankr. at 975; *Anderson*, 74 Bankr. at 463-64; *City of Akron v. Jackson* (In re *Jackson*), 77 Bankr. 120, 121-22 (Bankr. N.D. Ohio 1987); *Leach*, 63 Bankr. at 725; *Ganzer*, 54 Bankr. at 76; *Thomas*, 51 Bankr. at 188.

47. See *Hudson II*, 859 F.2d at 1423-24; *Tyler*, 98 Bankr. at 398; *Straup*, 90 Bankr. at 484; *Rose*, 86 Bankr. at 91; *Smith*, 83 Bankr. at 435; *Jones*, 80 Bankr. at 975; *City of Akron v. Jackson* (In re *Jackson*), 77 Bankr. 120, 122-23 (N.D. Ohio 1987); *Anderson*, 74 Bankr. at 464; *Leach*, 63 Bankr. at 726-27; *Ganzer*, 54 Bankr. at 76-77; *Thomas*, 51 Bankr. at 188-89.

48. See *Hudson II*, 859 F.2d at 1420-23; *Tyler*, 98 Bankr. at 398-99; *Straup*, 90 Bankr. at 483; *Rose*, 86 Bankr. at 91; *Smith*, 83 Bankr. at 435; *Jones*, 80 Bankr. at 975-76; *Anderson*, 74 Bankr. at 464; *Jackson*, 77 Bankr. at 122-23 (dicta); *Leach*, 63 Bankr. at 726; *Ganzer*, 54 Bankr. at 76-77; *Thomas*, 51 Bankr. at 188-89.

49. 51 Bankr. 187 (Bankr. E.D. Va. 1985).

50. *Id.* at 188 (emphasis in original).

51. *Id.* at 188-89. The court also noted that given that it takes a considerably longer time to obtain a judgment than it takes to file for bankruptcy, the injured party cannot prevail "absent a dilatory debtor." *Id.* at 189.

Congress could not have intended this result, reasoning that it was unlikely that Congress attempted "to remedy a national problem and then failed at it."⁵²

The same views were expressed by the court in *Thomas v. Ganzer* (In re *Ganzer*).⁵³ The *Ganzer* court noted that the language of subsection (a)(9) "arguably supports the conclusion that a prepetition judgment or consent decree is required to make the exception to discharge applicable."⁵⁴ In spite of the literal language of the provision, the court was compelled to look beyond this language to the "presumed" congressional intent:

Presumably, Congressional intent in enacting 11 U.S.C. section 523(a)(9) was to preclude a debtor's discharge from liability on a claim arising out of the operation of a motor vehicle while under the influence of alcohol. If a prepetition judgment determining liability to have been incurred by the debtor under such circumstances, be required, the statute is practically useless. Only in cases of legal malpractice will prepetition judgments ever be entered. This Court will not presume Congress to have intended to sabotage its legislation and create such an absurdity.⁵⁵

The court in *Blackmer v. Richards* (In re *Richards*)⁵⁶ also followed this view, recognizing that the wording of section 523(a)(9) "apparently requires the reduction of a claim against an intoxicated driver to judgment or consent decree prior to the [debtor's] bankruptcy."⁵⁷ As with the aforementioned cases, the *Richards* court rejected the plain language of section 523(a)(9) on the grounds that such a reading would "emasculate the expressed concern of Congress."⁵⁸ Accordingly, the court held that it would permit "judgments or consent decrees to be entered post-petition, so long as [they were] grounded upon pre-petition claims."⁵⁹

The cases discussed above are representative of how a majority

52. *Id.* at 189. The court stated that "[n]othing in the Congressional intent reflects a wish to so impede an injured party. I believe [section 523(a)(9)] means if the injured creditor can obtain a consent or a judgment in state court based on legal intoxication, the debt is nondischargeable." *Id.*

53. 54 Bankr. 75 (Bankr. D. Minn. 1985).

54. *Id.* at 76.

55. *Id.* at 76-77.

56. 59 Bankr. 541 (Bankr. N.D.N.Y. 1986).

57. *Id.* at 543.

58. *Id.*

59. *Id.*

of the courts have addressed the question of whether a creditor must have a prepetition judgment or consent decree against a debtor to be eligible for relief under section 523(a)(9).⁶⁰ As indicated in these cases, the courts were consistent in recognizing that the literal language of section 523(a)(9) requires that a creditor's claim for nondischargeability be based on a prepetition judgment or consent decree against the debtor that has been issued by a court of record.⁶¹ In spite of this acknowledgment, these courts gave little deference to the literal language of the statute. They proceeded to grant creditors, who did not have prepetition judgments or consent decrees against debtors, relief from the automatic stay to obtain post-petition judgments or consent decrees against the debtor, thus permitting these creditors to seek relief under section 523(a)(9).⁶² These courts have justified this position based on a selective reading of congressional intent and legislative history.⁶³ The courts also argued that requiring a prepetition judgment or consent decree for

60. See *Hudson II*, 859 F.2d 1418, 1419-24 (9th Cir. 1988) ("[d]runk driving claim need not be reduced to judgment or consent decree before debtor files for bankruptcy . . . to have consequent debt declared nondischargeable"); *Burch v. Tyler* (*In re Tyler*), 98 Bankr. 396, 397-99 (Bankr. N.D. Ill. 1989) ("accident victims claim, arising out of debtor's operation of motor vehicle while intoxicated, was not dischargeable . . . even though no civil judgment had yet been obtained against debtor"); *Bryant v. Straup* (*In re Straup*), 90 Bankr. 481, 482-84 (D. Utah 1988) (allowing "judgments or consent decrees relating to debts from drunk driving accidents to be entered post-petition"); *Young v. Rose* (*In re Rose*), 86 Bankr. 86, 87-92 (Bankr. E.D. Mich. 1988) (§ 523(a)(9) does not require judgment to be entered before bankruptcy petition is filed for drunk driving debt to be nondischargeable); *Allstate Ins. Co. v. Smith* (*In re Smith*), 83 Bankr. 433, 434-36 (Bankr. E.D. Mich. 1988) (same); *Jones v. Hager* (*In re Jones*), 80 Bankr. 974, 975-76 (W.D. Mo. 1987) (same); *American Family Mut. Ins. Co. v. Anderson* (*In re Anderson*), 74 Bankr. 463, 463-65 (Bankr. E.D. Wis. 1987) (withholding further action in nondischargeability proceeding arising out of debtor's alleged operation of motor vehicle while intoxicated, until injured party had obtained judgment in state court suit); *Leach v. Reckley* (*In re Leach*), 63 Bankr. 724, 725-27 (S.D. Ind. 1986) (§ 532(a)(9) available to claimants who have not reduced their claims to judgment or consent decree before the debtor files bankruptcy petition); *Thomas v. Ganzer* (*In re Ganzer*), 54 Bankr. 75, 75-77 (Bankr. D. Minn. 1985) (same); *Searight v. Thomas* (*In re Thomas*), 51 Bankr. 187, 188-89 (Bankr. E.D. Va. 1985) (same); *Dougherty v. Brackett* (*In re Dougherty*), 51 Bankr. 987, 988-89 (Bankr. D. Colo. 1985) (same).

61. See *Hudson II*, 859 F.2d at 1419, 1424; *Straup*, 90 Bankr. at 482; *Rose*, 86 Bankr. at 87-88; *Smith*, 83 Bankr. at 434; *Thomas*, 51 Bankr. at 188.

62. See *Tyler*, 98 Bankr. at 398-99; *Straup*, 90 Bankr. at 484; *Rose*, 86 Bankr. at 91-92; *Smith*, 83 Bankr. at 436; *Jones*, 80 Bankr. at 976, 978; *Anderson*, 74 Bankr. at 464-65; *Leach*, 63 Bankr. at 725; *Ganzer*, 54 Bankr. at 77; *Thomas*, 51 Bankr. at 189; *Dougherty*, 51 Bankr. at 989. But see *City of Akron v. Jackson* (*In re Jackson*), 77 Bankr. 120, 124 (Bankr. N.D. Ohio 1987) (potential debt discharged because creditor had not filed state action before debtor filed bankruptcy petition).

63. See *Hudson II*, 859 F.2d at 1421-23; *Tyler*, 98 Bankr. at 397-98; *Rose*, 86 Bankr. at 90-91; *Thomas*, 51 Bankr. at 188-89.

relief under section 523(a)(9) permitted a clever and swift debtor to escape potential liability for drunk driving by racing to file a petition in bankruptcy before an injured victim was able to obtain a judgment or consent decree against the debtor from a court of record.⁶⁴

In spite of the judicious approach that these courts have taken to prevent debtors from effectuating a loophole in section 523(a)(9), a few courts have been more troubled by the willingness to ignore the language of the statute. This minority has either rejected the decision of the majority to dismiss the plain language of section 523(a)(9), or they have elected to qualify their willingness to follow the majority in cases with special distinctions.

City of Akron v. Jackson (In re *Jackson*)⁶⁵ is one case in which the court refused to ignore completely the language of section 523(a)(9).⁶⁶ In determining whether section 523(a)(9) required that a debt be reduced to judgment prior to the filing of a petition in bankruptcy, the court held that the language of the provision "clearly describe[d] the subject debt as one arising from a judgment or consent decree."⁶⁷ The court noted that in all of the majority cases choosing to ignore or to take a "relaxed interpretation of this requirement," there was a factual distinction that made their decision not to defer to the literal language of section 523(a)(9) less troublesome than in the facts before it.⁶⁸ In each of those cases, the creditors seeking relief under section 523(a)(9) had at least commenced a civil action against the debtor prior to the filing of the bankruptcy petition;⁶⁹ whereas in *Jackson*, the creditor did not have a civil action pending against the debtor at the time the bankruptcy petition was filed.⁷⁰ This distinction was critical to the court's interpretation of the "judgment or consent decree"⁷¹ requirement of section 523(a)(9), and the extent to which the court would relax its reading of the plain language of the statute:

The express language of the statute requires that the debt

64. See *Hudson II*, 859 F.2d at 1420, 1423; *Tyler*, 98 Bankr. at 398; *Straup*, 90 Bankr. at 483; *Smith*, 83 Bankr. at 435; *Thomas*, 51 Bankr. at 188-89.

65. 77 Bankr. 120 (Bankr. N.D. Ohio 1987).

66. See *id.* at 122-23.

67. *Id.* at 122.

68. *Id.* at 122-23.

69. *Id.*

70. *Id.* at 121. The creditor seeking relief in *Jackson* was the City of Akron. The court noted that the accident from which the damages to the city resulted had occurred five months prior to the debtor's filing of the bankruptcy petition. *Id.* at 123. The court felt that the City of Akron was not "dilatory" because it failed to bring a civil action against the debtor within the five month period. *Id.*

71. 11 U.S.C. § 523(a)(9) (1988).

arise "from a judgment or consent decree." If the language of the revised statute is to be given any deference at all, it would seem that as a preliminary consideration of the invocation of nondischargeability pursuant to section 523(a)(9), the civil action must have at least been commenced in state court.⁷²

The majority position has been rejected by the Bankruptcy Appellate Panel of the Ninth Circuit in *Stackhouse v. Hudson* (In re *Hudson*) (*Hudson I*).⁷³ The court, in its analysis of whether a prepetition judgment or consent decree is required under section 523(a)(9), began with the language of the provision, finding it to be "clear and unambiguous,"⁷⁴ and refused to ignore the statute's explicit language because of an aversion to drunk drivers.⁷⁵ Although the appellate panel shared the concern of the majority in not wanting to permit drunk drivers to escape liability through a loophole found in the poor draftsmanship of the provision, it held that the analysis of the majority in permitting relief under section 523(a)(9) "without a pre-petition judgment [did] not withstand scrutiny."⁷⁶

The *Hudson I* court found further clarity in the meaning and intent of section 523(a)(9) in section 727(b) of the Code,⁷⁷ which sets forth the statutory allowances of discharge under the Code.⁷⁸ Section 727(b) provides that "except as provided in section 523" a debtor will be discharged from all debts arising before the date of the order for relief, which is the same as the date that the bankruptcy petition is filed by the debtor.⁷⁹ The court noted that based on section 727(b):

... the status of the claim at the date of the order for relief determines whether the claim is or is not dischargeable under any subsection of § 523(a). All claims that arose before the commencement of the case are discharged, except as provided for in § 523(a).

At the date of the order for relief, the [creditor] only

72. *Jackson*, 77 Bankr. at 123 (quoting 11 U.S.C. § 523(a)(9) (1988) (citations omitted)).

73. 73 Bankr. 649, 654 (Bankr. 9th Cir. 1987) *rev'd*, 859 F.2d 1418 (9th Cir. 1988).

74. *Id.* at 653.

75. *Id.* "We are not free to disregard the plain language of the statute because of an aversion to drunken drivers, an aversion we share with our brothers in [other] cases." *Id.*

76. *Id.*

77. 11 U.S.C. § 727(b) (1988).

78. 73 Bankr. at 653.

79. 11 U.S.C. § 727(b) (1988). Section 301 of the Bankruptcy Code defines "order for relief" in a voluntary bankruptcy as occurring at the time the debtor files his or her petition in bankruptcy. *Id.* § 301.

had a claim against [the debtor], *not a judgment or consent decree*.⁸⁰

Therefore, the court held that the creditors' claim did not meet the requirements of section 523(a)(9) because they did not have a judgment or consent decree against the debtor as required thereunder.⁸¹ Although the court's interpretation of section 523(a)(9) allowed the debtor to escape liability for drunk driving under that provision, it was compelled to "follow the [law] as written by Congress."⁸² The court stated that "[i]f, as some courts suggest, Congress erred in drafting the statute, then Congress must enact legislation to correct it."⁸³

Congressional ability to enact corrective legislation is perhaps the court's strongest argument for a literal and strict interpretation of section 523(a)(9). The court's position on this point of interpretive license is courageous, particularly because a literal interpretation may allow a debtor to escape liability for drunk driving under the provision. Nevertheless, the court is correct in acknowledging the limitations of judicial interpretation by its choice to act within the confines of its duty to interpret the law as written.

B. Hudson II: *A Case of Judicial Interpretation or Legislation?*

In spite of the well reasoned opinion of the court in *Hudson I*, it subsequently was reversed by the Ninth Circuit Court of Appeals.⁸⁴ This reversal by the Ninth Circuit Court was not unanimous and included a compelling dissent, which eloquently and persuasively added to the arguments of the *Hudson I* court.⁸⁵ The *Hudson II* majority's analysis of the statutory requirements of section 523(a)(9) was premised on the "intent of Congress;"⁸⁶ the court stated that the most persuasive evidence of such intent is found in the "words selected by Congress."⁸⁷ The court, however, offered very little insight regarding the wording of section 523(a)(9) and what it believed the words of the statute revealed about congressional intent,

80. *Hudson I*, 73 Bankr. at 653 (emphasis added).

81. *Id.* at 654.

82. *Id.* at 653.

83. *Id.*

84. *See Hudson II*, 859 F.2d 1418, 1419 (9th Cir. 1988).

85. *See id.* at 1424-28 (Wiggins, J., dissenting).

86. *Id.* at 1419 (quoting *United States v. Taylor*, 802 F.2d 1108, 1113 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987)).

87. *Id.* (quoting *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1032 (9th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987) (quoting *Director, Office of Workers' Compensation Programs v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981))).

other than to read the statute as not "specifically address[ing] whether a claim must be reduced to judgment or consent decree *before* the debtor files for bankruptcy."⁸⁸ Accordingly, the *Hudson II* court did not base its interpretation on the wording of section 523(a)(9), but elected to follow the position of the lower bankruptcy courts, as discussed in cases like *Thomas*⁸⁹ and *Ganzer*.⁹⁰ These cases essentially dismissed the literal meaning of section 523(a)(9) to "prevent drunk drivers from escaping liability by discharging debts in bankruptcy. . . ."⁹¹

The *Hudson II* court held that the legislative history of section 523(a)(9), supported the interpretation that section 523(a)(9) did not require a creditor to have a prepetition judgment or consent decree against a debtor to be eligible for relief.⁹² To demonstrate that Congress' primary concern in enacting 523(a)(9) was to prevent drunk drivers from being able to escape liability for such conduct, the majority opinion cited the testimony of Senators Danforth and Heflin, and Representative Rodino.⁹³ Senator Danforth stated:

"Today there exists an unconscionable loophole in the bankruptcy statute which makes it possible for drunk drivers who have injured, killed, or caused property damage to others to escape civil liability for their actions by having their judgment debt discharged in Federal bankruptcy court. This loophole affords opportunities for scandalous abuse of judicial processes."⁹⁴

The court then quoted Senator Heflin:

"Also contained in this package is a modified version of a bill introduced by Senator DANFORTH which pro-

88. *Id.* at 1420 (emphasis in original).

89. *Searight v. Thomas (In re Thomas)*, 51 Bankr. 187 (Bankr. E.D. Va. 1985); *see supra* notes 48-52 and accompanying text.

90. *Thomas v. Ganzer (In re Ganzer)*, 54 Bankr. 75 (Bankr. D. Minn. 1985); *see supra* text accompanying notes 53-55.

91. *Hudson II*, 859 F.2d at 1420.

92. *Id.* at 1421-24.

93. *Id.* at 1421.

94. *Id.* (quoting 129 CONG. REC. S1622 (daily ed. Feb. 24, 1983)). The court continued:

. . . Sen. Danforth's references to "escap[ing] civil liability" and "scandalous abuse of judicial processes" suggest that Congress was concerned less with whether a judgment had been obtained against the debtor than with the underlying conduct giving rise to the cause of action Statements of other legislators bear out the contention that combating drunk driving, and not protecting judgments, was the paramount concern of Congress.

Id. at 1422.

vides that a debt incurred as a result of an act of drunk driving is not dischargeable By making such debts nondischargeable, we can protect victims of the drunk driver and deter drunk driving

[T]his amendment [will] prevent the discharge of judgments or claims where the debtor's operation of a motor vehicle while legally intoxicated were to occur."⁹⁵

The opinion continued: "Rep. Rodino, Chairman of the House Committee on the Judiciary, stated that § 523(a)(9) 'clarifies present law relating to the nondischargeability of debts incurred by drunk drivers. Debts incurred by persons driving while intoxicated are presumed to be willfully and maliciously incurred under this provision.' "⁹⁶ Based on this testimony, the majority argued that Congress was not that concerned about whether or not a prepetition judgment or consent decree had been obtained against the debtor as a prerequisite for nondischargeability.⁹⁷

In its review of additional congressional testimony regarding section 523(a)(9), however, the court also referenced the comments of Senator Dole and Representative Sawyer, whose comments included specific references to the fact that debts subject to nondischargeability under the provision would arise from judgments.⁹⁸ Similarly, the court recognized that the Senate Judiciary Committee Report accompanying the proposed amendment also referred to such debts as arising out of judgments.⁹⁹ Nevertheless, the court dismissed these references to debts arising out of "judgments" as being insignificant, and stated that the primary intent of Congress in

95. *Id.* (quoting 129 CONG. REC. S5362 (daily ed. Apr. 27, 1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 576, 577) (emphasis added by court).

96. *Id.* (quoting 130 CONG. REC. H7489 (daily ed. June 29, 1984)).

97. *Id.*

98. The court referred to remarks by two legislators:

Two members of Congress did refer specifically to judgments. Sen. Dole said the provision was intended "to ensure that victims of the drunk driver do not have their judgments against the drunk driver discharged in bankruptcy." Rep. Sawyer noted that "[j]udgments against drunk drivers for personal injuries . . . could be discharged in bankruptcy like any other judgment; now that is prohibited."

Id. (quoting 130 CONG. REC. S8890 (daily ed. June 29, 1984) and 130 CONG. REC. H7492 (daily ed. June 29, 1984)) (citations omitted).

99. The court quoted the report, which was not submitted with the final legislation but which accompanied the Omnibus Act at its introduction:

"Subtitle 'D' of the Committee bill is a modified version of S2159 (97th Congress), a bill introduced by Senator Danforth which would render debts incurred as a result of an act of drunk driving nondischargeable in bankruptcy. Under present law, a debt that is the result of a tortious act—such as a judgment against a debtor as a result of an automobile accident—is nondischargeable

enacting the new exception to discharge was to put "drunk driving on the same legal footing as liability from a 'willful' act, which was nondischargeable under § 523(a)(6)."¹⁰⁰ The court opined that Congress supported the majority interpretation of section 523(a)(9). The court based this conclusion on "Congressional silence;"¹⁰¹ it reasoned that because Congress had not voiced any objection to this interpretation of section 523(a)(9), that it must have agreed with the majority's "common-sense interpretation" of section 523(a)(9).¹⁰²

Although the decision of the *Hudson II* majority and the position of the lower bankruptcy courts permits aggrieved creditors to seek relief under section 523(a)(9) without a prepetition judgment against the debtor, it is a decision that is problematic when considering the standard of review applicable when interpreting a statute.¹⁰³ In a zealous effort to apply "common sense to the inartfully drafted statute,"¹⁰⁴ the majority in *Hudson II* continued to perpetuate the practice of the lower bankruptcy courts in rejecting the literal wording of section 523(a)(9).¹⁰⁵ The dissenting opinion in *Hudson II* offered the most compelling arguments against the majority interpretation of section 523(a)(9) and a sound challenge against this kind of judicial legislating.¹⁰⁶

The first issue addressed in the dissenting opinion concerned the manner in which the *Hudson II* majority and the lower courts interpreted congressional intent in the enactment of section

only if the debt is the result of a 'willful and malicious injury' to the property or person of another

This bill will help deter drunk driving and protect victims of the drunk driver, by making such debts non-dischargeable in bankruptcy. Where a debt was incurred by the debtor as a result of an act of drunk driving, that debt will not be dischargeable regardless of any court finding that willful, wanton, or reckless behavior was or was not involved."

Id. (quoting S. REP. NO. 65, 98th Cong., 1st Sess. 43-44 (1983)) (emphasis added by court). The court continued: "The report uses the word 'judgment' as merely one example of a nondischargeable debt. It manifests Congress' primary intent to put liability resulting from drunk driving on the same legal footing as liability arising from a 'willful' act, which was nondischargeable under § 523(a)(6)." *Id.* at 1423.

100. *Id.* at 1423.

101. *Id.*

102. *Id.*

103. *See supra* note 25.

104. *Hudson II*, 859 F.2d at 1424 (Wiggins, J., dissenting).

105. *See id.* at 1424-28.

106. *See id.* The dissenting opinion consists almost entirely of a direct quotation from a "draft disposition" of Judge Anderson, who heard oral arguments but died before the court issued its decision. *See id.* "Judge Anderson has stated the reasons in his draft disposition which I herewith adopt in relevant part." *Id.* at 1424.

523(a)(9).¹⁰⁷ The dissenting opinion stated that the reasoning behind the lower bankruptcy courts' interpretation of the congressional intent of section 523(a)(9) was "premised on *presumed* congressional intent" and not the literal language of the statute.¹⁰⁸ The dissent also noted that the lower bankruptcy courts cited by the *Hudson II* majority supported this interpretation and acknowledged that the literal language of section 523(a)(9) required that a creditor have a prepetition judgment or consent decree against the debtor for nondischargeability.¹⁰⁹

The points made in the dissenting opinion focus on the weaknesses in the majority's analysis and interpretation of section 523(a)(9). The *Hudson II* majority specifically stated that congressional intent is found in the words selected by Congress in writing a statute.¹¹⁰ Yet, it followed the position of many lower bankruptcy courts that rejected the language of the statute to permit creditors without prepetition judgments to seek relief under section 523(a)(9) while simultaneously acknowledging that the words of the statute are clear enough to indicate that a prepetition judgment is a requirement for relief.¹¹¹

Although Congress almost certainly did not anticipate that debtors might attempt to avoid the consequences of nondischargeability under section 523(a)(9) by filing petitions in bankruptcy before a creditor could seek a judgment or consent decree against the debtor from a court of record, it is not the responsibility of the courts to intentionally misinterpret the statute to prevent such avoidance.¹¹² To permit creditors without prepetition judgments or consent decrees to seek relief under the provision when the language of the provision does not provide for such relief is not only an improper exercise of judicial interpretation, but is presumptuous for the courts to dismiss the significance that Congress specifically has defined the subject debt as one reduced to judgment or consent decree by a court of record.¹¹³ By requiring that the debt arise out of a judgment or consent decree issued by a court of record, Congress defined the debt or claim as definite and having legal

107. *Id.* at 1424-27.

108. *Id.* at 1424 (emphasis in original).

109. *Id.* at 1424-26.

110. See *supra* note 87 and accompanying text.

111. See *Blackmer v. Richards (In re Richards)*, 59 Bankr. 541, 543 (Bankr. N.D.N.Y. 1986); *Thomas v. Ganzer (In re Ganzer)*, 54 Bankr. 75, 76-77 (Bankr. D. Minn. 1985); *Searight v. Thomas (In re Thomas)*, 51 Bankr. 187, 188-89 (Bankr. E.D. Va. 1985).

112. See *supra* text accompanying note 25.

113. *Id.*

certainty. This is not an unusual characteristic of the protected debts that fall within the section 523 exceptions to discharge. The debts that are nondischargeable under section 523 have significant legal definition, either by statute, adjudication, or contract. Examples of the types of protected debts under section 523 include: tax obligations; alimony or child support payments; legal fines or penalties; and contract obligations, such as outstanding educational loans.¹¹⁴ Based on this common characteristic of section 523 exceptions, it was reasonable for Congress to require a creditor seeking relief under section 523(a)(9) to have a claim reduced to a judgment or consent decree issued by a court of record.

The dissenting opinion in *Hudson II* made another compelling point when it noted that the *Hudson II* majority and the lower bankruptcy courts violated the "fresh start" principle of bankruptcy law by interpreting section 523 (a)(9) in a manner that was favorable to the aggrieved creditor.¹¹⁵ As the opinion emphasized, exceptions to discharge are applied narrowly under the fresh start principle, and are done so in a manner that is favorable to the debtor.

In determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor. Any other construction would be inconsistent with the liberal spirit that had always pervaded the entire bankruptcy system.¹¹⁶

Like the court in *Hudson I*, the *Hudson II* dissent also agreed that when section 523(a)(9) is read in conjunction with section 727(b) of the Code, the meaning of the exception to discharge under section 523(a)(9) becomes even clearer.¹¹⁷ As noted above, section 727(b) provides that a debtor who voluntarily seeks relief in a Chapter 7 liquidation will receive a discharge from all debts incurred before the filing of the petition in bankruptcy "[e]xcept as provided in section 523"¹¹⁸ The dissenting opinion opined that because the debt described under section 523(a)(9) was one that "arises out of a judgment or consent decree," a creditor with a claim that had not been reduced to a judgment or a consent decree did not have a debt

114. See 11 U.S.C. §§ 523(a)(1), (5), (7), (8) (1988).

115. See *Hudson II*, 859 F.2d 1418, 1425 (9th Cir. 1988) (Wiggins, J., dissenting); see also discussion *supra* note 7 regarding the "fresh start" policy of the Code.

116. *Hudson II*, 859 F.2d at 1425 (Wiggins, J., dissenting) (quoting 3 COLLIER ON BANKRUPTCY ¶ 523.05A at 523-16, 523-17 (15th ed. 1987)).

117. 859 F.2d at 1425-26 (Wiggins, J., dissenting).

118. 11 U.S.C. § 727(b) (1988).

eligible for relief as provided therein.¹¹⁹ This point of statutory construction, delineating the relationship between sections 523 and 727(b), was not addressed by the majority in *Hudson II* or by any of the lower bankruptcy courts that the majority cited. This is a significant omission by a court interpreting the question of nondischargeability, as section 727(b) is the foundation for any determination of dischargeability under the Code.¹²⁰

The dissent also considered the relevancy of the legislative history of section 523(a)(9) in determining the congressional intent behind the provision.¹²¹ The dissent stated, as did the majority, that it is the plain language of the statute that is conclusive of legislative intent unless there is a "clearly expressed legislative intention" to the contrary.¹²² After reviewing the legislative history of the provision, the dissent concluded that nothing in the legislative history of section 523(a)(9) indicated that Congress intended the exception to apply to post-petition judgments or consent decrees.¹²³ The court noted:

Indeed, all discussion in the legislative history is specifically directed at persons or families who have been the victims of drunk drivers *losing their judgments* by reason of the debtor's subsequent bankruptcy petition. If Congress had wished to extend the coverage of § 523(a)(9) to encompass post-petition judgments, it could have easily made clear its intention to do so. As the Supreme Court has observed:

"When even after [going behind the plain language of a statute in search of a possibly contrary congressional intent] nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation."¹²⁴

The dissent's reading of the legislative history regarding section 523(a)(9) is correct. Moreover, *all* of the references to congressional testimony cited by the majority included some reference to aggrieved creditors having judgments or consent decrees against

119. *Hudson II*, 859 F.2d at 1425-26 (Wiggins, J., dissenting).

120. See 11 U.S.C. § 727 (1988).

121. See *Hudson II*, 859 F.2d at 1426 (Wiggins, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)) (emphasis in original).

the debtor.¹²⁵

The dissent addressed the impact of a literal interpretation of section 523(a)(9).¹²⁶ The dissent did not agree with the majority that a literal interpretation of section 523(a)(9) made the provision meaningless by encouraging debtors to race into the bankruptcy courts to avoid liability for drunk driving debts.¹²⁷ The dissent reasoned that there may be occasions when a debtor would want to avoid filing a petition in bankruptcy, and that a debtor may elect to defend an action against himself or herself for such liability.¹²⁸ More significantly, the dissent cited several cases brought under section 523(a)(9) in which the debtor did not race to the bankruptcy courts to avoid a civil judgment.¹²⁹ In these cases, the creditors had prepetition judgments or consent decrees against the debtor, and

125. See *Hudson II*, 859 F.2d at 1421-23, quoted *supra* in notes 94-99. The *Hudson II* majority dismissed the significance of these references to debts arising from judgments in the congressional testimony by stating that the primary purpose of Congress in enacting § 523(a)(9) was to prevent debtors from escaping financial liability for drunk driving debts, and that Congress was not concerned with whether or not the aggrieved creditor had a prepetition judgment or consent decree against the debtor. 859 F.2d at 1423. This qualification of the significance of the references to "judgments" in the congressional testimony is not substantiated by any of the testimony cited by the majority, *id.* at 1421-23, and thus, would appear to be a conclusion solely based on the opinion of the majority. What the majority does in reaching this conclusion is rewrite the legislative history to support its interpretation of the provision.

126. See *Hudson II*, 859 F.2d at 1426-27 (Wiggins, J., dissenting).

127. *Id.*

128. *Id.*

129. See *id.* The dissent stated:

Indeed, based upon the dire consequence envisioned by those who would view a literal reading of § 523(a)(9) as rendering the statute nugatory, one would expect never to see a judgment entered prior to the commencement of the debtor's bankruptcy. Such is not the case. The statute on the contrary appears to be functioning as contemplated by Congress. See, e.g., *In the Matter of Brunson*, 82 B.R. 634 (Bankr. S.D. Ga. 1988) (pre-petition default judgment nondischargeable); *In re Bennett*, 80 B.R. 800 (Bankr. E.D. Va. 1988) (pre-petition default judgment nondischargeable); *In re Christiansen*, 80 B.R. 481 (W.D. Mo. 1987) (pre-petition judgment obtained but remanded to bankruptcy court for causation determination); *In re Keating*, 80 B.R. 115 (Bankr. E.D. Wis. 1987) (pre-petition default judgment nondischargeable); *In re Pahule*, 78 B.R. 210 (E.D. Wis. 1987) (pre-petition judgment nondischargeable); *In re Gomez*, 70 B.R. 96 (Bankr. S.D. Fla. 1987) (pre-petition judgment nondischargeable); . . . *Dougherty v. Brackett*, 51 B.R. 987 (Bankr. D. Colo. 1985) (pre-petition guilty, plea restitution order, and promissory note constitute nondischargeable consent decree); *In re Coup*, 51 B.R. 939 (Bankr. N.D. Ohio 1985) (pre-petition judgment obtained but debt dischargeable due to insufficient evidence of intoxication); *In re Cunningham*, 48 B.R. 641 (Bankr. W.D. Tenn. 1985) (pre-petition judgment nondischargeable).

Id.

thus demonstrated that section 523(a)(9) was effective as written.¹³⁰ In response to the majority's argument that a literal interpretation of section 523(a)(9) may be offensive in allowing the quick-minded debtor to avoid liability under the provision, the dissent argued that aggrieved creditors who do not have prepetition judgments may in the alternative seek relief under section 523(a)(6) if they can prove that the injury sustained was the result of the debtor's willful and malicious conduct.¹³¹ As discussed above, creditors who have been uncertain about their eligibility for relief under section 523(a)(9) have sought relief for nondischargeability under section 523(a)(6) and are encouraged to do so by the courts.¹³²

Perhaps the most critical reasoning behind the dissent's decision to interpret section 523(a)(9), as it is written, is the duty of the judiciary to interpret statutes as written and not to rewrite them, no matter how "inartfully drafted." The dissent stated:

[I am] aware that [my] application of the plain language of § 523(a)(9) may occasionally lead to objectionable consequences for those injured by the deplorable and irresponsible actions of drunk drivers. This, however, is not a sufficient basis for ignoring clear statutory language;¹³³

"[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.' . . . Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result."¹³⁴

CONCLUSION

Section 523(a)(9) of the Code is an important and innovative addition to the armory of legislation designed to discourage drunk driving and to assure financial reparation for the drunk driver's victim. It is evident from the case history of section 523(a)(9) that the

130. See *supra* note 129.

131. *Hudson II*, 859 F.2d at 1426 (Wiggins, J., dissenting).

132. See *supra* text accompanying notes 31-42.

133. *Hudson II*, 859 F.2d at 1427 (Wiggins, J., dissenting).

134. *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))) (citations omitted).

bankruptcy courts have been zealous to make the provision effective. As a result of such zeal, these courts have interpreted section 523(a)(9) in a manner that is contrary to the "literal language" of the provision, and have based this interpretation on the "presumed" intent of Congress.

These courts have elected to misinterpret section 523(a)(9) to overcome its weaknesses as an "inartfully drafted" statute. As section 523(a)(9) is written, a creditor may seek relief thereunder, if he or she has a prepetition judgment or consent decree against a debtor for a debt incurred as a result of the debtor's operation of a motor vehicle while legally intoxicated. The courts argue that Congress could not have intended such a requirement because it would deny relief to drunk driving victims who have not been able to obtain a judgment or consent decree against the debtor before the debtor files a petition in bankruptcy. These courts reason that this requirement makes it desirable for debtors to race into the bankruptcy courts before their victims are able to obtain a judgment or a consent decree from a court of record to avoid nondischargeability under section 523(a)(9).

Contrary to the belief of these courts, not all debtors are inclined to rush into bankruptcy for the purpose of avoiding the consequences of section 523(a)(9). As noted in the *Hudson II* dissent, bankruptcy courts have considered numerous nondischargeability determinations under section 523(a)(9) in which creditors have had prepetition judgments or consent decrees against debtors. Although a literal reading of section 523(a)(9) does preclude creditors who do not have prepetition judgments or consent decrees against debtors from relief thereunder, the question surfaces whether it is appropriate for courts to interpret this provision contrary to the way it was drafted by Congress. As recognized by the *Hudson II* majority and dissent, a court must first look to the words of a statute when rendering an interpretation, and then to the legislative history if there is some ambiguity in those words or something contrary in the legislative history. The wording of section 523(a)(9) is relatively clear, and the legislative history does not suggest a meaning contrary to the plain language of the provision. Moreover, when section 523(a)(9) is read in conjunction with section 727(b) and interpreted in accordance with the fresh start principle of bankruptcy law, the literal reading of section 523(a)(9) is further substantiated. While a literal interpretation of section 523(a)(9) makes a nondischargeability determination of a drunk driving debt available only to the creditor with a prepetition judgment or consent decree

against the debtor, section 523(a)(6) continues to be a viable option for such a determination for the creditor who was not able to obtain the prepetition judgment or consent decree as required under section 523(a)(9).

Accordingly, when interpreting section 523(a)(9) within the confines of basic principles of statutory construction, a court should conclude that a creditor seeking relief thereunder must have a judgment or consent decree against the debtor from a court of record at the time the debtor files a petition in bankruptcy. If there are to be any changes in the requirements of section 523(a)(9), they should be made by Congress and not the courts. Perhaps the courts interpreting section 523(a)(9) in the future will follow the dissent in *Hudson II* and interpret section 523(a)(9) as it is written, and thus remain within the "realm of interpretation" and not venture into the "domain of legislation."